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Edw. C. Levy Co. d/b/a The Levy Company and Rex N. Franklin, Petitioner and International Union of Operating Engineers, Local Union No. 150, AFL-CIO, CLC, Intervenor. Case 25-RD-1490

December 28, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in a mixed manual-mail ballot election held October 27, 2006, and the Regional Director's and hearing officer's reports recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 0 for the Petitioner, 0 for the Union, with 225 challenged ballots.²

The Board has reviewed the record in light of the Union's exceptions to the Regional Director's report and its supporting brief, and has decided to adopt the Regional Director's findings and recommendations.³

The Board has also reviewed the record in light of the Union's and the Employer's exceptions to the hearing officer's report and their supporting and answering

¹ The mail ballot portion of the election was held between October 30 and November 3, 2006.

² Individuals who were on strike against the Employer at the time of the election voted by mail ballot, while individuals the Employer hired as replacements for the strikers voted by manual ballot. The Union challenged the ballots of the replacement workers on the basis that they were ineligible, temporary replacements, rather than permanent replacements. The Board agent supervising the election challenged the ballots the strikers cast by mail on the basis that the voters' names did not appear on the voting eligibility list.

³ On December 15, 2006, the Regional Director issued a Report on Objections, Order Directing Hearing and Notice of Hearing. The Regional Director recommended that the Board overrule the Union's Objections 1 through 5, 10 through 24, 27, 35, and 37. The Regional Director directed that a hearing be held to resolve issues raised by the challenged ballots and by the Union's Consolidated Objections 6, 7, 8, and 25, and Objections 9, 26, 28 through 34, and 36. The Union excepted to the Regional Director's finding that the Union was precluded from attempting to show, in a representation proceeding, that the strikers were unfair labor practice strikers. The Union also excepted to the Regional Director's direction of a hearing on the challenged ballots and to the Regional Director's recommendation to overrule its Objections 3, 4, 5, and 10.

In the absence of exceptions, we adopt pro forma the Regional Director's recommendation to overrule the Union's Objections 1, 2, 11 through 24, 27, 35, and 37, and the Regional Director's recommendation to direct a hearing on the Union's Objections 6 through 9, 25, 26, 28 through 34, and 36.

briefs.⁴ We have decided to adopt the hearing officer's recommendation to overrule the challenges to the ballots cast by the replacement employees and to sustain the challenges cast by striking employees.⁵

We do not adopt, however, the hearing officer's recommendation to sustain the Union's Objections 6, 7, 8, 25, 30, and 33, which, taken together, alleged that the Employer threatened replacement employees with the loss of their jobs, and linked the security of their jobs to the results of the decertification election. We find, contrary to the hearing officer, that the Employer's statements do not constitute objectionable conduct sufficient to set aside the election.⁶

Facts

The Employer operates a slag processing and steel mill services facility in Burns Harbor, Indiana. The Union has represented the Employer's production and maintenance employees for many years. The parties' most recent collective-bargaining agreement expired in March 2005. In August 2005, when negotiations for a successor agreement proved unsuccessful, the Union called a strike against the Employer.⁷ The Employer continued its operations using supervisors and replacement employees. We have adopted the hearing officer's finding that the Employer offered permanent employment to replacement

⁴ A hearing was held on January 3, 4, and 5, 2007. On February 1, 2007, the hearing officer issued a Report on Challenged Ballots, Objections, and Recommendations to the Board. The hearing officer, finding that the replacement employees were permanent replacements, recommended that the Board overrule the challenges to the ballots cast by replacement employees, and sustain the challenges to the ballots cast by strikers. The hearing officer also recommended that the Board overrule the Union's objections 9, 26, 28, 29, 31, 32, 34, and 36. However, the hearing officer recommended that the Board sustain the Union's Objections 6, 7, 8, 25, 30, and 33. The hearing officer recommended that a rerun election be conducted among replacement employees.

The Union excepted to the hearing officer's recommendation to sustain the challenges to the strikers' ballots. The Employer excepted to the hearing officer's recommendation that the Board find it engaged in objectionable conduct.

⁵ In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Union's Objections 9, 26, 28, 29, 31, 32, 34, and 36.

⁶ The Union contends that the Employer's failure to specifically except to the hearing officer's ruling on Objection 30 requires the Board to adopt the recommendation to sustain that objection. We do not agree. The hearing officer discussed Objections 6, 7, 8, 25, 30, and 33 as consolidated objections, but alternately referred to or omitted reference to Objection 30 in his recommendation to sustain the consolidated objections. Given the hearing officer's discussion of these six objections as *consolidated* objections, we think it clear that the omission of any specific reference to sustain Objection 30 was inadvertent error on the part of the hearing officer. Consequently, we also think it clear that the Employer's exceptions to the hearing officer's recommendation to sustain the consolidated objections encompass Objection 30 as well.

⁷ The Union also induced employees it represented at sister companies to the Employer to engage in sympathy strikes.

employees on or about March 27, 2006.⁸ The decertification petition here was filed in September 2006, and, pursuant to the Stipulated Election Agreement, both replacement employees and striking employees were permitted to vote in the election that was scheduled for October 27, 2006.⁹

During the strike, the Employer and the Union continued to negotiate for a new collective-bargaining agreement, and attempted, among other things, to resolve issues raised by the strike, including the Union's bargaining proposal that the Employer return all striking employees to work. At a January negotiating session, Union Representative Dave Fagan proposed that "all former employees go back to work." Linda Wyatt, the Employer's human resources director, asked Fagan how many employees (strikers) would be coming back to work. Fagan testified he stated that, to the best of his knowledge, "probably 30 or 40 employees had found other work," and that he was not sure they would be coming back. According to notes taken by Wyatt, which the parties agree accurately reflect the parties' discussions at the negotiating sessions, Fagan indicated that 40 to 60 strikers had jobs elsewhere and "probably won't come back," and that 15 strikers "are working elsewhere" and "may or may not return."

In a July negotiating session, Fagan presented a "complete and comprehensive," 14-point bargaining proposal that included the Union's request that all strikers be offered reinstatement with their original date of hire, as well as the Union's offer that the Employer could fill any vacancies with replacement employees. Fagan testified that Wyatt then asked how many employees would be coming back to work. Fagan indicated that "around 50 percent [of the strikers] would probably not be coming back to work." Fagan testified that the 50 percent figure was in reference to the total number of employees who were on strike not only at the Employer's facility, but also at the facilities of two companies affiliated with the Employer at which employees had engaged in a sympathy strike.¹⁰

⁸ In his discussion of the offer of permanent employment that the Employer made to replacement employees, the hearing officer distinguished *Target Rock Corp.*, 324 NLRB 373 (1997). In *Jones Plastic & Engineering Co.*, 351 NLRB No. 11 (2007), the Board overruled *Target Rock Corp.* to the extent it suggests that at-will employment is inconsistent with or detracts from an otherwise valid showing of permanent replacement status. There is no such contention in this case.

⁹ All subsequent dates are in 2006 unless indicated otherwise.

¹⁰ Production and maintenance employees represented by the Union engaged in a sympathy strike at Levy Indiana Slag Co. and the Edw. C. Levy Co., both of which are affiliated with the Employer. These two employers discharged the sympathy strikers. We take administrative notice of the proceedings in Cases 13-CA-42917 and 13-CA-42899, in which the Union filed unfair labor practice charges alleging that the

Between October 9 and 13, the Employer conducted its regular monthly safety meetings at which the plant manager and a supervisor discussed safety procedures and related concerns. Wyatt attended these meetings and discussed the upcoming election with employees. Wyatt told employees they could possibly lose their jobs and that the Union "poorly represented" its members by having employees at Levy Indiana Slag Co. and Edw. C. Levy Co. engage in a sympathy strike in the face of a contractual no-strike clause. Either Wyatt or Human Resources Manager Waha stated that part of the Union's negotiations was to "get rid of" replacement workers and "let all the [strikers] have their jobs back," and that the Union "wants all replacements out." Waha urged the employees to vote against the Union "if you want to keep your job," and stressed that the Union "does not want you (replacement workers) here."

In a letter to employees dated October 16, Wyatt explained the mechanics of voting in the upcoming election, urged employees to vote, and stated that the election outcome "will determine the future of our business and your job at Levy." Wyatt also stated, in the letter, that during recent negotiations, the Union had proposed that the Employer put all strikers back to work. Wyatt concluded that if the Union were voted out, the Employer "will no longer be required to negotiate with Local 150 (strikers will not be able to take your jobs)."

On October 25, two days before the election, the Employer's executive vice president, Evan Wiener, spoke to employees about the election. Wiener, referring to contract negotiations with the Union, pointed out that one "key feature" of the Union's negotiation was "they want to put their strikers back to work." Wiener assured the employees that the Employer had consistently informed the Union that it already had, and wanted to keep, its work force, i.e., the replacement employees. Wiener pointed out that the Employer, contrary to the Union, believed that replacement employees were eligible to vote in the election, but that strikers were not eligible.

discharges were unlawful. The Region dismissed the charges on the basis that the evidence was insufficient to support a finding that the no-strike clause of the collective-bargaining agreements privileged sympathy strikes. The Office of Appeals upheld the dismissals of the unfair labor practice charges on March 6, 2006.

The Union also filed contractual grievances concerning the sympathy strikers' discharges. We take administrative notice of the August 31, 2007 arbitration award in which an arbitrator denied the grievances, finding that the employers had just cause to discharge the strikers as the no-strike clause of the contracts did not privilege sympathy strikes. We take administrative notice of the proceedings in Cases 13-RD-2520 and 13-RD-2522, involving Levy Indiana Slag Co. and the Edw. C. Levy Co., respectively. On October 31, 2007, we granted the employers' motions to supplement the records in those two cases by introducing the arbitration award.

Wiener stated that the Employer did not believe that the strikers' votes would count, but suggested there would be a "fight about that" with the Union. Wiener emphasized that the Employer did not want Local 150 back and did not want the strikers back; that the Employer wanted to keep the replacement workers as its employees; and that the Employer wanted all of the replacement employees to vote "no" in the decertification election.

The Union's Objections

The Union's Objections 6 and 7 alleged that the Employer threatened that if replacement employees voted for the Union, they would lose their jobs and that the Employer depicted strikes, violence, and loss of jobs as the inevitable consequence of continued representation by the Union. Objections 8, 25, and 33 alleged that Linda Wyatt, on or about October 11 and in her October 16 letter to employees, threatened replacement workers that if they voted for the Union, strikers would be able to take their jobs, but that once they decertified the Union, the Employer would no longer be required to negotiate with the Union. Objection 30 alleged that on October 25, Evan Wiener told replacement employees that the Union does not want replacement workers to continue to work for the Employer.

The hearing officer consolidated these six Objections for discussion, as, taken together, they alleged that the Employer threatened replacement employees with the loss of their jobs and linked the security of their jobs with the results of the decertification election.

Hearing Officer's Report

The hearing officer recommended sustaining the Union's Objections regarding the Employer's conduct. He found that Wyatt's statement to replacement employees, in her October 16 letter, that the election results would determine the future of their jobs, when combined with the Employer's statements in its October meetings to the effect that the Union wanted all replacement employees "out," and that if the Union was voted out, the Employer would not have to negotiate with the Union and that strikers would not be able to take replacement workers' jobs, impliedly threatened replacement employees with the loss of their jobs. He further found that the Employer implicitly linked the security of the employees' jobs with the results of the decertification election.

The hearing officer rejected the Employer's contention that it simply informed the employees of the Union's bargaining proposal regarding returning strikers to work. The hearing officer found that the Employer "selectively left out portions of" the Union's proposals. The hearing officer acknowledged that Wyatt's notes of the negotiating sessions show that the Union's proposals called for

the return of all strikers, but concluded, from Fagan's comments regarding the number of strikers who might return, that the Union did not expect that all strikers would, in fact, return. In this regard, the hearing officer noted that the Union proposed that the Employer could fill any vacancies with current replacement employees. While acknowledging that the Employer did not present employees with inaccurate or false details of the Union's proposals, the hearing officer nonetheless determined that Wyatt and Wiener, although having "personal knowledge of the Union's proposals," gave replacement employees only "pieces" of those proposals by omitting Fagan's estimate of the number of strikers who were likely to return to work.

The hearing officer described the Employer's statements that omitted Fagan's estimates as "inaccurate and misleading," and emphasized that they were made at the same time that Wyatt and Wiener told employees that if they voted "no" in the election, the strikers would not be able to take their jobs. The hearing officer found that the Employer's incomplete description of the Union's bargaining proposals regarding the return of striking employees, coupled with its declaration that the outcome of the decertification election would determine the security of the replacement employees' jobs, raised the prospect of job loss and linked continued employment with the election results. The hearing officer concluded that the Employer had engaged in objectionable conduct sufficient to set aside the election.

Discussion

We have carefully reviewed the record and find, contrary to the hearing officer, that the Employer's statements to its employees, taken as a whole, did not constitute a threat that employees would lose their jobs if the Union were not voted out in the decertification election.

It is well settled that an employer "is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). An employer may make a prediction as to the precise effect he believes unionization will have on his company, so long as the prediction is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control." *Id.* Applying these principles to the facts presented here, we find, contrary to the hearing officer, that the Union's Objections 6, 7, 8, 25, 30, and 33 should be overruled.

By its conduct, the Employer provided its current work force—all of whom were striker replacements—concrete

information about the possible outcome for them should the Union prevail in its desire to continue to represent employees and achieve its contract demands. The Employer's speeches and memoranda described a series of events and demands that conveyed the unvarnished facts that because of the Union's conduct, striking employees elsewhere had lost their jobs, and that the Union had made contractual demands which, if followed, would also lead to the replacement employees being supplanted by the strikers. The Employer did not threaten employees with job loss. Rather, it explained to them the consequences of the Union's demands that could result in their replacement by striking employees. That the Employer did not explain every possibility to employees does not transform its lawful statements into objectionable threats.

It is clear that the Employer provided employees with accurate information. Thus, Wyatt's notes of the January and July 2006 bargaining sessions confirm that the Union wanted the Employer to return *all* striking employees to work. There is no dispute that Fagan proposed at the January session that "all former employees go back to work," and proposed at the July session that "all strikers be offered reinstatement." There is also no dispute that, on several occasions shortly before the October 27 decertification election, representatives of the Employer discussed the Union's bargaining proposals with replacement employees. Employer representatives told employees that the Union "wants all replacements out" and "does not want you [replacement employees] here," and that in recent negotiations, the Union had proposed that the Employer "put all strikers back to work." The Employer's presentation of the substance of the Union's proposals was consistent with what Fagan had requested in negotiations. We find, in agreement with the hearing officer, that the Employer did not present "inaccurate or false details" of the Union's bargaining proposals to its employees, but truthfully and accurately conveyed the substance of those proposals to its employees.

We do not agree, however, with the hearing officer that the Employer's omission of any reference to Fagan's bargaining session comments that some strikers might not return to work rendered its description of the Union's bargaining proposals "inaccurate and misleading." Upon questioning by Wyatt, Fagan stated that, "to the best of [his] knowledge," some strikers "*probably* won't come back" or "*may or may not* return." In the absence of any evidence showing that Fagan's claim had a factual basis, we think it clear that his comments were, at best, merely a "guess" or an estimate on his part. Further, Fagan's "estimate" was not part of the Union's actual bargaining proposal. Wyatt's notes of the July bargaining session show that the 14-point written bargaining proposal that

Fagan presented did not include *any* estimates of how many striking employees might or might not return.¹¹ The Union's formal proposal on this issue was stated clearly, succinctly, and unequivocally—*all* strikers were to be offered reinstatement. That being so, the Employer was not compelled to tell its employees that the Union did not expect that all strikers would actually return to work. Although the Employer did not reveal all of the Union's bargaining table comments to its employees, the Employer did not misstate or misreport the Union's formal, written bargaining proposals, which clearly did not include any "guesses" as to the number of strikers who might return to work.

Finally, and significantly, at no time did the Employer make any threats of reprisals or promise any benefits in return for employees voting against the Union. On the contrary, rather than threatening its employees with adverse employment action, the Employer consistently told its employees that they were permanent employees, that the Employer wished to retain them as its work force, and that the Employer did not want the strikers to return. It was the Union, in seeking the return of all its striking members, which sought to displace replacement employees from their jobs.

For all these reasons, we find that the Employer did not engage in objectionable conduct as alleged by the Union. The Employer accurately presented its employees with the substance of the Union's bargaining proposals, and lawfully discussed with them the possible consequences, both positive and negative, that could ensue if the Union's proposals were accepted. Significantly, the Employer's discussions with its employees were devoid of threats or promises. Accordingly, we overrule the Union's Objections 6, 7, 8, 25, 30, and 33, and remand the case to the Regional Director with directions to open and count the ballots cast by permanent replacement employees and to issue a revised tally of ballots.

¹¹ Wyatt's notes show that the Union's proposal was that "All strikers and sympathy strikers at The Levy Company, ECL or LISCO will be offered reinstatement with their original date of hire."

ORDER

IT IS ORDERED that the case is remanded to the Regional Director for further appropriate action consistent with this Decision.

Dated, Washington, D.C. December 28, 2007

Peter N. Kirsanow Member

Dennis P. Walsh, Member

Peter C. Schaumber, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD